
Governor Pete Wilson

Putting Action into the Open Space Element:

Techniques for Preserving Open Space and Farmland



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TECHNIQUES FOR PRESERVING OPEN SPACE AND FARMLAND

Each county and city in California must adopt an open space element as part of its general plan. The element is a statement of local planning policies focusing on the use of unimproved land or water for: 1) the preservation or managed production of natural resources, 2) outdoor recreation, and 3) the promotion of public health and safety. By law the document must contain an “action program” identifying specific techniques which the county or city intends to use in implementing its open space plan. The purpose of the following paper is to improve the effectiveness of local open space elements by highlighting potential action program components.

Open space zoning and Williamson Act contracts are widely used preservation techniques. These place regulatory limits on the types of uses which may be pursued in agricultural areas in order to prevent the conversion of agricultural lands to non-compatible uses. Every California county and general law city must adopt open space zoning (Government Code section 65910). Most of the agricultural counties have active Williamson Act programs offering land owners property tax incentives to keep land in agriculture. As a result, most California planners have already sampled some of the ample literature regarding agricultural preserves and zoning.

To avoid repetition, this publication focuses primarily on non-regulatory approaches which acquire open space lands or development rights. Some of the techniques discussed below may be used directly by a city or county, while others rely upon a program of cooperation with other local governments or private organizations.

FINANCING ACQUISITION

One of the best methods for preserving open space and farmland is to buy or lease the land. This avoids questions of inverse condemnation or “taking” since the owner is compensated for the rights to the land. But where does the money for such acquisition come from? The following sections describe a variety of funding sources that are available to local governments.

A recent Constitutional amendment has significantly restricted the ability of local governments to raise revenues through many of the following funding sources. Proposition 218, enacted by California voters in November 1996, “protects taxpayers by limiting the methods by which local governments exact revenue

from taxpayers without their consent.” Many of the general taxes, assessments, and user fees previously used to raise revenues are now subject to voter approval under the provisions of Proposition 218. The significance of Proposition 218 in funding open space initiatives will be discussed in the following sections. Not all sources of revenue are affected, but overall, the process will be slower, the overhead costs will be greater, and, with the new ability of the electorate to repeal or reduce taxes, assessments, fees, and charges by initiative, there will be less certainty of a continuous revenue stream.

Remember that acquisition is not limited to fee simple purchases of land. Purchasing development rights, property options, or easements can also be effective means of protecting open space, depending upon the circumstances. For a detailed discussion of many of the available options, refer to *Tools for the Greenbelt* published by The Greenbelt Alliance, a San Francisco-based open space advocacy group.

Development impact fees are a popular method for financing park land (under the Quimby Act) and infrastructure. However, we will not discuss impact fees in detail. While impact fees and dedications of land are useful on a project-by-project basis, in our opinion they are not particularly well suited to be the sole basis for a long-range acquisition program. There are several reasons for this:

1. The amount of fees collected is directly related to the rate of development within the community. They cannot be depended upon during times of slow activity.
2. Fees are short-term in nature. Under California law, unused and uncommitted fees must be re-funded if not obligated in five years.
3. Fees must be clearly justified. They must be based

upon a nexus that relates the purpose and amount of the fee to the specific development project, its proportional impact on the community, and the governmental purpose that is being advanced by the fee.

4. Impact fees concentrate on new development. They are not spread over the community as a whole even though their results may be enjoyed by everyone.
5. Fees often cannot provide an adequate lump sum for significant improvements to be built at one time. They also do not offer a dependable return on investments to support bonded indebtedness.

Two good reference books on fees are *The Calculation of Proportionate-Share Impact Fees* by James C. Nicholas, available from the American Planning Association, and *Public Needs and Private Dollars*, by William Abbott, et al., and available from Solano Press Books.

Most experts agree that development impact fees are not affected by Proposition 218. The Constitutional amendment clearly provides that Proposition 218 does not apply to “existing laws relating to the imposition of fees or charges as a condition of project development” (Section (b)(1), Article XIID, California Constitution). As such, development impact fees remain under the authority of the Mitigation Fee Act (Government Code section 66000, et seq.) and do not require voter approval.

The Mello-Roos Community Facilities Act (Government Code section 53311 et seq.) is a tax-based financing method available to cities, counties, and special districts. It authorizes local governments to establish community facilities districts (CFDs) within which they may levy special taxes and issue bonds to finance open space acquisition, maintenance, and other programs.

Approval of the special tax and any related bond issue requires approval by two-thirds of the district electorate. When there are fewer than 12 registered voters in a CFD, approval must be by two-thirds of the district’s landowners. Since Mello-Roos taxes already require a two-thirds vote, they are not affected by the voter approval requirements of Proposition 218. However, as with all special taxes, Mello-Roos taxes are subject to reduction or repeal by initiative under Proposition 218.

CFD boundaries need not be contiguous. For example, areas may be excluded from the district where there is sufficient open space or where voters oppose a tax levy.

Several years ago, the city of Fairfield created three Mello-Roos CFDs to fund open space acquisition. The city levies special taxes on both developed and undeveloped land. The taxes vary among the districts and are administered by the Solano County Farmlands and Open Space Foundation. Proceeds from the first of these CFDs helped to finance the purchase of 1000 acres of grazing land in Lynch Canyon.

Cities and counties may use the **Infrastructure Financing District (IFD)** law (Government Code section 53395 et seq.) to form tax increment districts to finance the purchase of open space. Similar to redevelopment financing, the IFD provides a way for localities to purchase open space without raising property taxes. However, in order for an IFD to be formed, each of the other taxing agencies must grant its approval before any of its portion of their increment can be collected by the IFD. Since an IFD should only be established in substantially undeveloped areas, conflicts should not occur with redevelopment areas.

In June 1986 California’s voters enacted Proposition 46 authorizing cities and counties to issue “**general obligation**” (**G.O.**) **bonds** “for the acquisition and improvement of real property,” including open space. Issuance of the bonds is premised on a two-thirds voter approval.

G.O. bonds are secured primarily by ad valorem property taxes. Cities and counties may increase property taxes beyond the normal Proposition 13 limit to pay the principal and interest on the bonds. Since investors perceive property taxes as being less risky than the security for other types of indebtedness, G.O. bonds may be issued at relatively lower interest rates. G.O. bonds are therefore less expensive funding mechanisms for local governments than revenue bonds, for example.

In November 1987, Redlands voters authorized a \$7.6 million G.O. bond with a 71% positive vote. About 50% of the money was designated for land acquisitions. As part of the city’s historic orange grove protection program, the open space bonds helped fund grove purchases along with other improvements such as land for open space at major city entrance points, preservation of large natural areas on the city’s periphery, a strip park with trails, land for expanded park and recreation spaces, and land for a sports complex, golf course, and swim complex.

In 1988 a combined total of 67.5 percent of the voters in Alameda and Contra Costa Counties autho-

rized the East Bay Regional Park District to issue \$225 million in G.O. bonds. The bonds financed a major expansion of the district's park and open space holdings. The bonds also financed the improvement and enlargement of various city park and recreation facilities within the East Bay district.

State law authorizes local governments to levy **special assessments** upon property owners in order to purchase and maintain open space. The owners must be the beneficiaries of the open space and the size of individual assessment levies must be strictly proportional to the amount of per-parcel "special benefit" which the property receives. As strictly defined by Proposition 218, "special benefit" means "a particular and distinct benefit over and above general benefits conferred on real property located in the district or the public at large. General enhancement of property value does not constitute 'special benefit.'" Assessments must not exceed the project's total cost.

Unlike a special district, a special assessment district is not a political entity. It is simply a designated area in which a local government levies open space charges.

Proposition 218 impacts special assessments more than any other of the financing mechanisms discussed in this report. The Constitutional amendment invalidates previously established procedures and court interpretations applied to the use and levying of special assessments. It restricts the uses to which assessments may be put, limits the property owners who may be charged assessments, increases local agency accountability, and prohibits assessments that lack the support of local property owners.

The formation of a district is premised on receiving approval from a majority of the affected property owners by cast of ballot (this method of voting is called an "assessment ballot proceeding" to distinguish it from an election). Ballots must be weighted proportionally to the financial obligation of the affected property. In contrast to previous law, the governing body does not have the authority to overrule the property owners when a majority cast ballots against district formation. Further, once an assessment is created, it may be repealed or reduced by popular vote.

The following existing assessments, in place as of November 5, 1996, are exempt from the application of Proposition 218:

"(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems, and vector control...

"(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed.

"(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

"(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment." (Section 5, Article XIII D, California Constitution)

The Park and Playground Act of 1909 (Government Code section 38000 et seq.) allows cities (but not counties) to impose assessments to finance the acquisition and improvement of public parks, playgrounds, and urban open space land. This act also allows a city to condemn land for these purposes.

The Landscaping and Lighting Act of 1972 (Streets and Highways Code section 22500 et seq.) enables cities, counties, and special districts to, among other things, acquire land for parks, recreation, and open space. In addition, a local government may use the assessments to pay for improvements and maintenance. Prior to Proposition 218, this Act was widely used on the basis that parks, open space, and recreation facilities benefited properties by increasing their value. Proposition 218 puts an end to this justification by imposing its strict definition of special benefit, thus making the Act much more difficult to use.

In 1990, the East Bay Regional Park District established a new Landscaping and Lighting Act assessment district to finance maintenance of parks in eastern Contra Costa County. In 1993, the parks district established another Landscaping and Lighting district covering both Alameda and Contra Costa Counties to fund maintenance of trails and trail corridors.

The little-used Open Space Maintenance Act (Government Code section 50575 et seq.) is helpful when a city or county has already acquired open space, but doesn't have a way to pay for its maintenance. Under the act, local governments may levy ad valorem special assessments to improve and maintain open space; reduce fire, flood, and erosion hazards; and perform related activities. The formation proceedings of this Act conflict with Proposition 218's provisions. The local government must substitute the requirements of Proposition 218 for any conflicting provisions in the code until proper legislative action is taken to reconcile the Act with Proposition 218.

Lease-purchasing is another technique for acquiring open space. A lease-purchase is, in effect, a loan. A city or county finds a bank, leasing company, nonprofit organization, etc., willing to purchase the targeted property. The purchaser then leases the land to the city or county which makes a regular appropriation for “rent.” The rent consists of principal and interest payments. At the end of the lease, the local entity has completely reimbursed the lessor and it ends up owning the property.

Cities and counties may sometimes use “certificate of participation” (COP) financing in conjunction with lease-purchasing to acquire expensive tracts of land. Under this technique, the lessor purchases the desired open space, leases it to the local government, and receives a small fee for his/her services. The lessor then assigns the rights to receive lease payments to a trustee. The trustee, working with an underwriter, issues certificates of participation to individual investors who contribute to the property acquisition fund to reimburse the lessor. The COP is a bond-like securing indicating the holder has an undivided interest in a percentage of the local government’s lease payments.

The local government annually appropriates funds for lease payments. The payments are then distributed to the certificate holders by the trustee. The percentage of the payment received by each such investor equals the percentage of the purchasing fund contributed by the investor. At the end of the lease, the city or county acquires title to the property.

Because it is similar to a lease, COP financing is not limited by statutory restrictions on long-term debt. Also, a city or county may issue COPs without a vote of the local electorate, unless an election is required by local charter.

Under a carefully crafted COP program, investors may be entitled to tax-free investment income (i.e., the interest portions of the lease payments). Depending on the local government’s credit rating, this type of financing can therefore be accomplished at a relatively low interest rate.

At times, COP financing can be complicated and costly because of all the players and arrangements involved in making it possible. Also, a local government must be careful that its actions relative to the acquired land do not invalidate the tax-exempt status of the lease-purchase arrangement.

The city of Carlsbad employed COPs in 1988 to acquire and preserve 52 acres of open space. The property contains a grove of trees and is nearly surrounded by urban uses. When word of its pending

development began circulating, preserving the grove became a hot political issue. As an alternative to G.O. bonds, the city turned to COPs to purchase and save the property. Carlsbad’s growth control plan provided the rationale for the city’s actions.

The cities of Los Altos and Cupertino have also issued COPs for open space purposes. Both used their funds to acquire excess school district lands to expand or develop local parks.

LAND BANKING

Land banking involves the acquisition of land in advance of expanding urbanization. The price of an open space parcel not yet subject to urban development pressures will probably be more closely based on current rather than speculative land uses. Land banking may therefore result in considerable savings to a jurisdiction seeking to preserve open space.

A city or county might use this technique to develop a greenbelt or simply to preserve key open space or agricultural tracts. The jurisdiction should have a definite public purpose for a land banking project.

A local government can recover its land banking expenses by leasing purchased property back to a farmer. Cities and counties may also recoup at least part of their costs by reselling the acquired land with deed restrictions that guarantee the property’s continued open space use. To date, land banking is not widely practiced in California. There are a number of examples, however.

Redlands is using land banking as part of its open space preservation plan. The city purchased a 20 acre dairy which adjoins a historic property at the city’s western extreme. The city also owns and operates extensive orange grove acreage.

Dixon and Vacaville are cooperatively banking agricultural land to preserve a greenbelt separator between the cities. Nearby, the city of Davis is land banking to create a greenbelt around its boundaries.

San Luis Obispo County uses Transfer of Development rights (TDR) for land banking. This regulatory approach allows land owners to sell credits which comprise the development potential of a restricted site. Those credits may be used to increase development intensity elsewhere. The County of San Luis Obispo has passed an ordinance allowing the San Luis Obispo Land Conservancy, (a nonprofit land trust) to sell the development rights to the land it is conserving. Initially, the trust received a grant of \$200,000 from the

State Coastal Conservancy for the purchase of environmentally sensitive land for open space in the coastal community of Cambria. The county designated a portion of the town of Cambria as the receiving zone for development credits that are transferred from the environmentally sensitive lands. Property owners in the receiving zone may purchase development credits (in the form of square feet of building area) from the trust in order to increase the square footage of their homes above the normally permitted limit.

An interesting feature of this transfer of development credits program is that it costs the county nothing, since the sale of credits is administered by the trust. Development is distributed over the whole community rather than in just a small number of large projects, because homeowners may purchase just the portion of development credits needed to make additions to their homes rather than having to purchase all the credits assigned to a parcel owned by the trust. Proceeds from the sale of development credits are used to purchase additional lands for open space.

CONSERVATION AND PRESERVATION ORGANIZATIONS

A **regional open space district** is another effective mechanism for preserving open space, including agricultural land. It's an independent special district with an elected board of directors that is incorporated through the cooperative efforts of a region's cities, counties, and voters. Its primary functions are to acquire, preserve, and maintain open space.

This narrow focus provides open space districts with an advantage over city and county governments when it comes to saving open areas. Since cities and counties have multiple and competing service objectives, open space funding can sometimes be diverted to other pressing needs. An open space district's revenues, on the other hand, may only be spent for open space purposes. This encourages a steady flow of funding for the long-term implementation of an open space plan.

During the past decade fiscal constraints have hindered the formation of new open space districts. As in the case of other local governments, regional open space districts have been financed primarily by property tax revenues. Property tax increases to fund new districts are restricted by Proposition 13.

In response, state legislation enacted in 1987 al-

lowed counties to increase their sales tax to finance general expenditures, thus expanding district funding opportunities. However, any sales tax dedicated solely to an open space district is considered a special tax and requires a two-thirds voter approval under Proposition 218.

Sonoma County voters created the Agricultural Preservation and Open Space District in 1990 and authorized a quarter-cent sales tax increase to fund the District. The \$10 to 12 million dollars annual revenue that results is used primarily to purchase conservation easements from willing sellers. Since 1992, the District has acquired easements over approximately 23,000 acres.

Also, SB 1685 (Ch. 982, Stats. 1986) authorizes open space districts to levy special assessments for open space purposes. These assessments are subject to Proposition 218's limitations on the use and levying of special assessments.

Regional open space districts are also authorized to levy special taxes, subject to a two-thirds voter approval. In addition, they may receive land grants and gifts and may employ debt financing measures such as general obligation bonds. They may also lease real estate as part of their preservation activities. For instance, to save agricultural land, they may purchase farms or grazing ranges and lease them back to farmers and ranchers. Regional districts, such as the Marin Open Space District, sometimes employ the services of land conservation trusts in acquiring open space.

In 1995, The Midpeninsula Regional Open Space District participated in a joint acquisition with the County of Santa Clara County to purchase 907-acre Jacques Ridge. Jacques Ridge provides a wildlife corridor connecting over 10,000 acres of contiguous park and open space lands. It also establishes a vital link in the Bay Area Ridge Trail. The Midpeninsula Regional Open Space District is responsible for the preservation of over 36,000 acres of open space extending from the city of San Carlos to the town of Los Gatos.

The enabling legislation for regional open space districts is in the California Public Resources Code commencing with section 5500 and in the Government Code commencing with section 56000. It is the same authority as that for regional park districts and regional park and open space districts.

A **land conservation trust** is another type of organization devoted to protecting open space, agricultural lands, wildlife habitats, and natural resource lands. The approximate 80 trusts in California achieve their objec-

tives primarily through acquiring and managing interests in land.

Most land trusts are local, private nonprofit entities with boards of directors made up of private citizens. They rely on private funds, corporate or foundation grants, and property gifts to carry out their land acquisition and management activities. A number of trusts in California also use public funds, such as those from Proposition 70 or the Coastal Conservancy, to purchase open space.

Land conservation trusts preserve open space and resource lands in a variety of ways. Some use their funds to acquire fee simple interest in real estate and then manage or lease back their holdings. Others purchase conservation easements which protect sensitive land from development while allowing owners to sell their remaining property interests to whomever they please. The Marin Agricultural Land Trust in Marin County has pioneered the use of such easements to preserve agricultural and dairy lands. The 20-year old Sonoma Land Trust now compliments the work of the County Agricultural Preservation and Open Space District and, over its lifespan has protected some 10,000 acres. For over a decade, the Kern River Parkway Foundation has acquired land along the Kern River in Bakersfield which has contributed to implementation of the city/county Kern River Parkway Plan. The Foundation has also planted over 3200 trees along the parkway.

Land trusts also purchase land and resell it with deed restrictions that guarantee the property's open space character in perpetuity. Alternatively, trusts sometimes acquire land on an interim basis and later transfer it to public or private conservation organizations.

Since they are less fettered by red tape, private land trusts are usually able to respond more quickly than governmental entities to sudden and fleeting purchasing opportunities. They also use their real estate experience to help public agencies with the mechanics of acquisition. For example, the Peninsula Open Space Trust in Menlo Park was originally organized to facilitate the land acquisition activities of the Midpeninsula Regional Open Space District.

Recently, the Peninsula Open Space Trust purchased 1,262 acres of wetlands on the Peninsula next to the San Francisco Bay from a development company for \$15 million after receiving a loan from a private group. In January 1997, the Trust for Public Land and the state Department of Parks and Recreation cooperatively acquired 13.9 acres of scenic land near Tomales Bay in Marin County as an addition to Tomales Bay State Park.

The American Farmland Trust and the Trust for Public Land often advise local land trusts on successful preservation programs. Another source of information for and about local land trusts is the Land Trust Alliance in Washington, D.C.

Another resource, published by The Land Trust Alliance, is a book entitled *Starting a Land Trust: A Guide to Forming a Land Conservation Organization*. The book outlines case studies in starting land trusts, how to organize a board of directors and articles of incorporation, how to apply for federal tax-exempt status, and much more. The appendices have a list of useful contacts and a sample of articles and bylaws.

OPEN SPACE AND CONSERVATION EASEMENTS

Cities and counties may accept or purchase easements from private landowners for open space and resource conservation purposes. Open space and conservation easements are, in effect, purchases of development rights. The deed transferring an easement to a local government must restrict the transferred property's use to open space or resource conservation activities.

Lands subject to the state's open space or conservation easement acts are "enforceably restricted." In other words, their value for property tax purposes is established on the basis of the easement restrictions rather than potential development uses. For properties which would otherwise have been subject to rising taxes, this is a form of tax relief. It provides landowners with an incentive to grant easements.

Cities and counties may acquire open space easements pursuant to the **Open Space Easement Act of 1974** (Government Code section 51070 et seq.). Land must remain within an easement in perpetuity or, alternatively, for at least ten years. An easement's term is automatically extended each year by an additional twelve months. Under certain circumstances, open space easements may be abandoned.

A city or county must have an adopted open space plan (element) as a prerequisite to acquiring an open space easement. Furthermore, the preserving of easement land in open space must be consistent with the local jurisdiction's general plan.

The **Conservation Easement Act** (Civil Code sections 815-816) enables a city, county, district, or nonprofit organization to acquire perpetual easements for

the conservation of agricultural land and open space, or for historic preservation. Unlike open space easements, there is no procedure for non-renewal of conservation easements and there is no expiration date.

In establishing an easement, a landowner and local agency agree upon the permitted land uses within the conservation area. The easement is binding upon successive owners of the land.

The Conservation Easement Act does not require conservation easements to conform to local general plans. Nevertheless, a general plan is useful as the rationale for a local easement program.

Recent state legislation has expanded opportunities for cities and counties to protect viable agricultural lands. The Department of Conservation's Agricultural Land Stewardship Program (ALSP) was enacted in 1995 as SB 275. The Program provides cities, counties, and non-profit land trusts with funding for the purchase of conservation easements from agricultural landowners. The Program complements the Williamson Act by providing permanent protection of agricultural land, targeting protection of most threatened agricultural land, placing ownership of development rights with a third party, usually a local land trust, and providing one-time payments allowing farmers to re-invest in their agricultural operations to improve profitability. Sources of revenue for funding include gifts, dona-

tions, legislative appropriations, general obligation bonds, federal grants or loans, and other sources.

The Agricultural Land Stewardship Program, along with the federal Farmland Protection Program, is currently facilitating funding for 940 acres on four proposed parcels of farmland – two farms in Monterey County, and farms in Fresno County and Solano County. The development rights on the properties will be transferred from landowners to various nonprofit land trusts while allowing the landowners to continue to own and farm the land.

CONCLUSION

State planning law mandates the inclusion of open space action programs in every local general plan. Many communities, in complying with this requirement, have gone a step further by adopting measures that preserve agricultural lands and protect open space. This publication has high-lighted a range of preservation options that are available to local governments. Counties and cities may use these techniques to expand the effectiveness of their open space elements but are cautioned to take adequate steps in order to meet the provisions of Proposition 218.

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East Bay Regional Parks District

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The Greenbelt Alliance

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The Land Trust Alliance

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Marin Agricultural Land Trust

P.O. Box 809
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Marin Open Space District

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San Luis Obispo Land Conservancy

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Trust For Public Land

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